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ARTICLE



The European Court of Human Rights at the grassroots level: who knows what about religion at the ECtHR and to what effects?

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ABSTRACT

In the last 25 years, the European Court of Human Rights (ECtHR) has been increasingly addressing some of the most divisive religion-related issues facing European societies. In the process, it has been setting from above certain parameters for religious pluralism in Europe. The present contribution draws on research designed to bring the Court's influence on religious pluralism into sharp focus, but from the ground up. We know more or less the direct effect of the Court in terms of implementation of its decisions. But we lack understanding of its indirect effects in terms of whether and how its case law mobilises grassroots actors (rights consciousness raising, agenda setting, bargaining 'in the shadow' of the Court). Such understanding presupposes insight into levels of awareness of the ECtHR and its religion-related case law: who knows what about religion at the ECtHR and to what effects? This contribution presents results of a study engaging social actors in four countries.

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Indirect effects; court authority; religious pluralism; rights consciousness; rights pursuit

Introduction

The European project finds itself at an acute impasse in the present context of challenges on several fronts, from a lingering financial crisis in some of its states to democratic backsliding in others, an unresolved refugee crisis which threatened to unhinge all semblance of unity to Brexit, literally unhinging the European Union and reflecting a new nationalism which undermines much of what European institutions stand for. In this context, there is a critical imperative to assess the popular legitimacy and popular effects of its institutions. The European Court of Human Rights (ECtHR, or the Court) is an especially important European institution. The ECtHR is the 'de facto Supreme Court of human rights in Europe' (Madsen 2016, 143) aiming to set common standards for Europe and beyond: its broad geographic mandate covers over 800 million people across 47 states. In the area of religion-related case law specifically, the Court is important because of its strikingly contentious topical ambit: from religious symbols in public spaces (whether worn, as the headscarf, or on the wall, as the crucifix), to whether a right not to be offended can be upheld through blasphemy laws, the Court has been addressing

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some of the most divisive and emotive issues facing European societies. And in the process, the Court has been setting, from above, certain parameters for religious pluralism in Europe.

The present text draws on research designed to bring the Court's influence on religious pluralism into sharp focus, but *from the ground up* (Fokas 2015a).¹ We have access to information about the direct effect of the Court in terms of implementation, or not, of its decisions via policy change enacted by national governments (Anagnostou and Psychogiopoulou 2013). But we lack insight into the indirect effects of the Court, in terms of whether and the extent to which the Court's case law mobilises grassroots level actors in pursuit of their rights.

In focusing on the indirect effects of courts, this study is heavily influenced by a very rich and well-developed North American socio-legal scholarship (see, for example, Galanter 1983; McCann 1992, 1994; Scheingold 2004). The work of Michael McCann is particularly instructive. In his *Rights at Work* (1994), a study of pay equity reform and the politics of legal mobilisation, McCann explores how ordinary people have rather more 'access' to the law than is suggested by critical legal theory. In this *decentred* tradition of legal analysis, courts are viewed as relatively peripheral to most forms of legal action, given that actual resort to judicial intervention is more the exception than the rule and, further, that compliance is only a very small part of the potential consequences of court decisions (McCann 1992, 731–732, 1994, ix). A study of the indirect effects of case law includes attention to the many ways its decisions are deployed by social actors in their rights campaigns, and in many venues outside of courts. McCann's work provides a response to judicial impact studies which focus on the substantial gaps between the promise of landmark court victories, on the one hand, and actual social change, on the other, by shifting the focus away from what happens in courts to how court decisions might influence what happens amongst civil society actors in their pursuit of their own rights (McCann 1992, 735, 1994, 2–3).

Inspired by this study, the broader research project from which the present contribution emanates focuses not on the gap between the promise of certain court decisions and actual social change but rather on the gap between such decisions and the change in societal *expectations*: to what extent do court decisions lead to a shift in social actors' conceptions of their rights, in their discourse about those rights and in their propensity to pursue those rights, whether through legal or political means?

Answers to the above question presuppose a far more basic one: how *aware* of the Court and its religion-related case law are social actors at the grassroots level? European institutions are notoriously exposed to criticism as non-transparent and distant from the citizen. This is no less the case for the ECtHR, often confused with the Court of Justice of the European Union (CJEU, which is in turn conflated with the European Court of Justice – the ECJ – one of the three courts comprising the CJEU). The ECtHR is also often wrongly assumed to be an institution of the European Union, as opposed to the Council of Europe (CoE). To what extent does knowledge about the Court's decisions related to religion trickle down to grassroots actors with a vested interest in these decisions, and to what effects?

In line with the bottom-up approach of McCann and other socio-legal scholars, insight into such questions requires empirical, qualitative research conducted with grassroots actors themselves (McCann 1992, 741–742). This text draws on a specific

dimension of interview-based research on the indirect effects of the Court's religion-related case law at the grassroots level: on responses to a series of questions designed to assess social actors' awareness of the Court and its engagements with religion. Through qualitative analysis, this research pursues a nuanced understanding of Court and case law awareness.

Further, and recognising that legal knowledge 'does not simply trickle down on citizens and state officials in a unidirectional, determinate fashion' (McCann 1992, 733), the research underpinning this text is shaped by the perspective that judicially articulated norms must be understood 'in the eye of the beholder', as they take a life of their own at the grassroots level. In Marc Galanter's words describing the 'radiating effects' of the law, 'the messages disseminated by courts do not carry endowments or produce effects *except as they are received, interpreted, and used by (potential) actors*' (Galanter 1983, 136; emphasis mine). Thus, the present study of awareness entails not only an assessment of levels of knowledge about the Court and its religion-related case law, but also a more contextualised understanding of how Court-produced messages might be *differently* interpreted amongst different social actors and in different national and local contexts. To this end, empirical research was conducted in several localities and amongst a broad range of social actors in four countries and contexts: Greece, Italy, Romania and Turkey.

While the North American socio-legal literature serves as an excellent resource and inspiration, there are certain significant challenges to grafting the relevant theories onto the European context. These are explored in the section below entitled 'Challenges in cross-continental grafting of legal scholarship'. Specifically, differences in the embeddedness of law and courts in American versus European culture and differences in both the public and private place of religion in the two contexts are amongst a series of factors explored for their potential impact on the indirect effects of case law in the US versus European contexts.

The next section details the methodology underlying the research and is followed by a presentation of the interview-based findings on grassroots level awareness of the ECtHR and its religion-related case law. Here, the results of two types of analysis are presented, the first addressing a number of factors influencing Court and case law awareness across the country cases amongst the various categories of interviewees, and the second focused on context-specific factors arising through comparative analysis of the country cases.

Finally, the text closes with a summary of the research findings and points to the need for ongoing research into the indirect effects of the ECtHR and its religion-related case law, particularly in the context of the currently volatile relationship between citizens and the European institutions meant to represent them.

Challenges in cross-continental grafting of socio-legal scholarship

As indicated above, a number of fundamental differences between the US and European contexts require careful attention in the application of socio-legal theory generated in the former setting. First, it is a cliché comparison and easily overemphasised, but certainly at a general level the United States is characterised by a far more developed judicialisation of politics than that which prevails in Europe. The latter is reflected in

Alexis de Tocqueville's much-cited observation that 'scarcely any political question arises in the United States that is not resolved sooner or later, into a judicial question' (de Tocqueville [1840] 1956, 126). Of all European countries, the UK is closest to the American model in this regard. Frances Zemans identifies in the US–Europe comparison an Anglo-American legal tradition which considers that the public good will emerge out of the assertion of individual claims, a view which, according to Zemans, 'fits nicely with the individualistic spirit that pervades American culture' (1982, 995). That said, a judicialisation of politics is rapidly spreading globally (Gibson, Caldeira, and Baird 1998; Kelemen 2011), and conspicuously so in Europe also, though with important distinctions from the American model (Kagan 2007).

Also clichéd, but with a fair measure of truth, is the presumption of a religious America and a secular Europe (Berger, Davie, and Fokas 2008). According to the World Values Study, 'on average, Europeans are less likely than the inhabitants of any other continent to say they believe in a deity or to attend religious services regularly',² and according to the European Values Survey, only 20.5% of Western Europeans reported attending religious services at least once a week, compared to some 46% in the USA. About 53.3% of West Europeans said they believed in life after death, compared with approx. 76% in the USA. Meanwhile, in a Eurobarometer survey of the top three values cited by European citizens, 45% listed peace amongst these, 42% listed human rights and 41% respect for human life; religion was mentioned by only 7% of respondents (McCrea 2015). On the other hand, as Ronan McCrea notes, Europe is far from being an entirely 'godless' continent: levels of nominal adherence to religion are high, while majority Christian religious institutions and symbols remain important elements of the national life and collective identity in most European states. Thus, McCrea explains, Europe's approach to religion is 'characterized by an odd mixture of formal links between religion and the state on the one hand and relatively limited substantive religious influence over law, politics and society on the other' (99–100). Those formal links between religion and state underpin a great number of cases before the ECtHR (see Fokas, 2018).

The judicialisation of politics in America and the centrality of religion in American public life may or may not yield more intersections between law and religion. Certainly, though in the US context, we see religious organisations often resembling large corporations in terms of organisational structures, and with a highly developed legal expertise and propensity to engage in 'big politics'. But even beyond this political field, religion has a conspicuous presence in US courts. Comparable data are not available for the European context but in the USA, according to Sullivan (2005, 9), lawsuits in which religion is at issue 'occur with regularity in state and federal courts all over the United States'. In part, the prevalence of religion in courts has to do with the centrality of the non-establishment of religion and separation of church and state clauses in the first amendment to the US Constitution. As a consequence, Sullivan notes, the word 'religion' or 'religious' appears over 14,000 times in state and federal statutes and regulations in the USA (11). Still, as in the case of the judicialisation of politics, the judicialisation of religion, too, is an increasingly relevant phenomenon in the European context. After all, it was not until 1993 that the ECtHR began engaging actively with religious freedom cases. And at the national level too, demographic changes and especially the increased presence of Islam in Europe, and a rise in secularist and atheist

challenges to majority Christian privilege, both contribute to more religion-related case law in Europe as well (McCrea 2015; Richardson 2015).

Third, and not unrelated to the points above, the workings of American courts are much closer to the popular consciousness, not least through *relatively* more robust (as compared with the European context) media coverage of court decisions – especially those of the US Supreme Court. Central to the seminal work by Rosenberg (1991) and Klarman (2001), criticising high expectations that US courts can produce meaningful social change is an emphasis on what they perceive as *poor* media coverage of court cases and consequent low levels of public awareness of these.³ The access to information on court decisions more generally, especially online, is also critical to popular awareness of these.⁴

Still, the contrast between the US and Europe in this regard is stark when considering the presentation of poll data on popular awareness of the US Supreme Court, lamenting gaps which, by European standards, would entail rather advanced knowledge. For example, the results of a 2015 Pew Research Center study were presented as indicative of the ‘dim public awareness’ of the Supreme Court, based in part on the fact that only 33% of Americans knew that there were three women on the Supreme Court (Dost 2015).

This begs the question of what exactly is meant by the term ‘awareness’. Critical studies have been conducted on popular awareness of the US Supreme Court and on the salience of its decisions at the grassroots level. These are instructive in refining conceptions of court awareness: the latter may include, amongst other things, varying levels of awareness of issues addressed by courts; details about the history, remit and judicial makeup of the court itself; details of the case law and judgements emanating from the court and procedural awareness or practical knowledge regarding how one might reach a particular court with a rights claim (Franklin, Kosaki, and Kritzer 1993; Gibson, Caldeira, and Baird 1998; Hoekstra 2003; Scott and Saunders 2006). Notably, none of these texts concentrate on rights consciousness and rights pursuit as potentially linked to court awareness.

In the broader research on which this contribution draws, the interest is on the latter dimension. Specifically, public awareness of the ECtHR is considered an important first stage in the potential of the Court to influence social actors’ awareness and conceptions of, as well as propensity to pursue (whether through legal or political channels) their own rights. The focus is primarily on case law (i.e. familiarity with particular cases or the topics addressed by the Court, even where case names are not known) but, where case law-specific awareness is low, the study seeks to assess whether and the extent to which more general awareness of the Court as an actor influencing human rights provision impacts in some way on grassroots actors’ conceptions and pursuit of religion-related rights.

As Hoekstra (2003) argues, we are misguided in focusing on uniform national effect of case law; more attention to localised effect is encouraged, but ‘the process is just more subtle and possibly more gradual’ (105). Indeed, the Court’s messages are variously filtered in different cultural contexts, and thus, the effect on rights consciousness and pursuit is also expected to be more localised. Hence, the choice to conduct the present study in different national contexts.

It should be noted that much of the socio-legal literature employed in the present study is focused on the US Supreme Court, which makes for an uneven application in

the case of the ECtHR (Fokas 2015b).⁵ Also, the status of the ECtHR as an international court (IC) deserves special attention. According to Alter, Helfer, and Madsen (2016), the ultimate expression of a court's authority is that amongst the public, but this level of authority is exceedingly difficult for an IC to achieve, for a number of reasons. First, they tend to be newer institutions, and the newness of ICs in general as judicial institutions constitutes a significant challenge to the authority they can establish. Further, they operate within a context of international regime complexity, which may entail competition amongst courts. Related to the latter, as Alter, Helfer and Madsen set out, lawyers, government officials, etc. often have deeply held ideas about national sovereignty, and these actors are key to the establishment of a court's authority.

Popular authority, these scholars argue, 'exists when recognition of IC rulings extends beyond the legal field to encompass the public in general', but 'given their relatively young age, new ICs are yet to reach the stage where publics understand, let alone recognise, the authority of ICs' (Alter, Helfer, and Madsen 2016, 11–12). They note that the specialised mandates of some courts may limit the extent to which publics ever recognise IC authority. Hence, the authors' decision not to consider this level of authority in their study of a number of ICs. According to Alter, Helfer and Madsen, the level of authority enjoyed by the ECtHR is *extensive authority*. A court with extensive authority has an audience which extends beyond its compliance partners to include an even broader range of actors such as civil society groups, bar associations, industries and legal scholars (10).

It follows from the latter analysis that the ECtHR, as other ICs, cannot be expected to have popular authority. Certainly the ECtHR is characterised by the challenges listed above. It is, as indicated earlier, a *fairly* young court (relative to western European national courts, though second oldest in the list of those studied by Alter, Helfer and Madsen). It has a specialised mandate. And it also exists in a web of multiple levels of authority which includes, vertically, different relationships with the national courts of the 47 member states, and horizontally, decisions especially by the United Nations Human Rights Commission and, increasingly, the CJEU, which has recently significantly stepped up its engagement with religious freedoms issues (see Fokas 2016).

All of the above makes for significantly different expectations to be had from the popular effects of the ECtHR, an IC of the CoE, not the EU (thus not in fact even in some way directly linked to governance of a semi-federal body; the EU at least has a parliament with officials elected from each member state and entails political and economic and social governance in a way not relevant to the CoE). The Court is not particularly widely covered by national media – with the exception of the UK (where media coverage has generally harmed rather than enhanced its authority). Thus, the ECtHR and the US Supreme Court are fundamentally differently embedded in society. It follows that while the ECtHR may (and does) take equally major decisions in the domain of religion, their reverberation at the grassroots level is, or at least may be expected to be, rather more limited than in the US context. The research underpinning the present text sets out to assess these reverberations.

Methods

As McCann notes, most scholarship at the intersection between law and social movements is court-centred, 'sticking close to official case law and actions of legal elites while

remaining distant from grassroots movement activity' (2006, 17). To this end, fieldwork was conducted with grassroots level actors in four different country contexts – Greece, Italy, Romania and Turkey. The Court's religion-related case law bears special relevance in these countries where religion is socially, culturally and politically significant, and the stakes are perceived by a broad range of religious, social and political actors to be relatively high in relation to ECtHR judgements on religion. In each of these countries, a strong relationship between religion and national identity, and church and state (whether 'positive', in the cases of Greece, Romania and Italy, or 'negative', as in the case of Turkey) renders highly salient, in theory at least, the Court's pronouncements that bear the potential to influence the public place of religion.

Meanwhile, the selection of cases represents a spectrum of levels of democratisation and Europeanisation, with Italy and Greece being rather more consolidated democracies (and with membership in the European unification project established in 1958 and 1981, respectively), and Romania and Turkey less consolidated democracies (and with more recent membership in the EU for Romania in 2007 and a continued negotiation process with Turkey). When considered comparatively, the research helps identify the significance of each of these dimensions when it comes to the impact of the ECtHR on the ground in various country contexts.

A first aim of the grassroots level fieldwork was to test the awareness of religion-related case law amongst relevant social actors. 'Religion-related' is broadly defined in this research and, thus also, the scope of social actors with 'vested interest': 'religion-related' includes issues either directly implicating religion (e.g. wearing or display of religious symbols in public spaces, or the right to places of worship or to conscientious objection based on religious convictions) or mobilising religious publics, often because the issue touches on core religious values or doctrines (e.g. social ethics issues such as abortion, same-sex marriage), or by the same token mobilising *secularist* publics in cases touching on religion-state relations and the place of religion in the public sphere, but also in counter-mobilisations against religious arguments on issues of social ethics.

Insight into levels and consequences of grassroots actors' awareness of the ECtHR and its case law is drawn from a thorough reading of approximately 70 interviews conducted by postdoctoral researchers based on the four case study countries with representatives of a broad range of conscience-based groups (majority and minority religious as well as secular and secularist); representatives of NGOs dealing with religious freedoms and human rights more generally; cause lawyers who undertake issues related to religion and social ethics and government officials responsible for matters of religious freedom.⁶ The present study includes 24 interviews with legal experts, 16 with NGO representatives, 15 with minority conscience-based group representatives, 10 with majority faith representatives and 6 with government officials.⁷

The interviews were semi-structured, drawing from a shared basic interview guide which included an 'awareness non-test test'. Specifically, in order to help with our understanding of levels of interviewee awareness of the Court and its case law, built into the interview guide was a test of the interviewee's awareness of six particular ECtHR religion-related cases – *Kokkinakis v. Greece* (1993), *Lautsi v. Italy* (2009, 2011), *Folgero v. Norway* (2007), *SAS v. France* (2014), *Sindicatul Păstorul cel bun v. Romania* (2013) and *Leyla Şahin v. Turkey* (2004). The list of cases includes one from each case study country included in the broader research programme, as well as older (*Kokkinakis*) and more

recent (SAS) cases, and key cases for issue areas studied in the broader research programme (e.g. for the study of religious education, *Folgero*). The ‘awareness non-test test’ was to be administered with great care to not give the impression to the interviewee that his or her personal knowledge of the case law was being tested as an end in and of itself rather than a means to understanding something broader about grassroots level awareness of the Court and its case law. In practice, however, administering the ‘awareness test’ in a non-intimidating manner was rather difficult in the context of several interviews; thus, the data are not systematic within or across all country case studies. Still, much insight may be gleaned from a careful reading of the transcripts, wherefrom knowledge can be assessed well beyond responses to the specific awareness questions.

Who knows what about religion at the ECtHR and to what effects?

The following discussion is devoted to developing an understanding of a variety of factors influencing levels of awareness of ECtHR religion-related case law and of the consequences of the latter. A first subsection entails a comparative analysis, wherein attention is paid to aspects of the different cultural, political and legal contexts of each of the four countries under study in efforts to understand the impact of these contextual factors on grassroots awareness of the ECtHR and its religion-related case law. The second subsection, derived from an aggregate analysis of the interview data across all four countries, focuses specifically on the role of agency and sources of information (or lack thereof) regarding the Court: one of the starkest findings of the present research, which in fact prompted the drafting of the present text, focused specifically on the question of awareness, is how little grassroots *non-legal* actors tend to know about the Court’s case law. Thus an analysis hinging on legal knowledge and sources of information about the Court is particularly worthwhile. It should be noted that, in general, the research generated less insight into messages communicated by the Court through particular religion-related judgements, and more insight instead into diffused messages *about* the Court, its impact on religion-related issues and its potential impact for grassroots actors, yielded by perceptions (of varying levels of accuracy) of the totality of the Court’s case law and its impact at the national level.

Cross-country comparative analysis

Can we gain a deeper understanding of the indirect effects of the Court by considering the data comparatively across different political, social and cultural contexts? The different reverberations of the case of *Lautsi v. Italy* across different country contexts suggest this is the case. The *Lautsi* judgement of 2009 found a violation of Article 2 of the 1st Protocol of the European Convention on Human Rights (that protecting the right to education in accordance with one’s philosophical or religious beliefs) in the mandatory display of the crucifix in Italian public schools. However, following the Italian state’s appeal and an unprecedented number of third party interventions by national governments, NGOs and Members of the European Parliament, the Grand Chamber reversed the decision in 2011. The judgement indicated that because the Italian public school

system was otherwise sufficiently religiously neutral, it was within the state's margin of appreciation to maintain the display of the crucifix in the schools.

Regarding messages received by non-specialist (non-legal) grassroots actors, in Greece a predominant message received was that the authority on these issues remains at the national level, and religious symbols are allowed in public schools. In Italy, non-legal actors interpreted the judgement as an indication that the Concordat between the Italian state and the Roman Catholic Church trumps most else, and no challenges to religion-state relations (and to majority religion privileges) would be upheld by the ECtHR. Meanwhile, the same categories of respondents in Romania read in the *Lautsi* verdict a blow to any minority religious claims. Only in Turkey, amongst the cases examined here, did *Lautsi* not reverberate much of anything amongst grassroots non-legal actors. Behind each of these different receptions and interpretations of the *Lautsi* case is a story specific to each country and comprised of a number of sub-themes. The latter are presented below as contextual factors which give shape to our cross-country comparative analysis.

First, variation in national political and legal opportunity structures across country cases is key to degrees of awareness of the Court and its case law. Within this factor, there are also significant variations from one issue area to the next. For example, LGBT activists in Greece with little hope of achieving their aims through political lobbying are more likely to litigate in the first place and, with low expectations of the national courts regarding LGBT rights, are more likely to become informed of the opportunities offered by the ECtHR. An Italian lawyer representing minority interests declares 'luckily, there is a judicial space in which we can advance with rights, while politics does nothing'. Similarly, in Turkey religious minority groups express little hope in both the national political and legal opportunities for securing their rights: 'Every time we went to national courts we lost. We usually see them as a way to the European Court of Human Rights'.

Closely related to the latter is where the Court stands within the national legal order, both *de jure* and *de facto* (with the latter much influenced by how national judges view the Court). In the Italian case, several Constitutional Court rulings have sought to clear a blurred status of international law in Italian law, culminating with a judgement (49/2015) through which the Italian Constitutional Court narrowed the domestic impact of the ECtHR case law. The judgement entailed an appeal to domestic judges to refrain from applying the ECtHR's case law where: (a) there is a high degree of jurisdictional creativity, which implies that the new principle is not well settled in the case law; (b) there are inner conflicts within the ECtHR's jurisprudence; (c) the principle is promulgated by a Chamber rather than Grand Chamber decision; (d) the ECtHR judgement displays a misunderstanding of the Italian legal context and (e) the decision is accompanied by dissenting opinions (Pin and Tega 2015). As a result, the Court provides lesser bargaining power before Italian national courts. In the words of one Italian lawyer, echoing Rosenberg's *Hollow Hope*:

In the end, we always come back to the fact that it is a task of the national state. The European instrument is essential, it is absolutely crucial, but the European instrument does not help you to change your laws, if you do not want to. That is, if the national legislature and the regional legislatures do not make those principles their own, we can go as many times as we want to the ECtHR, but we will never reach a definitive solution.

We find comparatively far higher hopes in the ECtHR emanating from Romanian and Turkish respondents, and this in part has to do with a greater embeddedness of the Court in the national judicial system which accompanied the EU accession process. Specifically, as part of the democratisation process entailed by the various stages of EU accession, in both countries lawyers and judges undergo rigorous training in the Convention system and in ECtHR case law; in the Romanian case, judicial promotions are intimately linked to judges' level of citation of ECtHR case law in their own judgements.⁸ The latter is likely to have a trickledown effect on grassroots actors' awareness, and expectations, of the Court, in terms of its impact on religion-related rights in general (not necessarily on rights claims of individual interviewees, and hopes of securing their rights before the ECtHR themselves; see below). According to one Romanian NGO representative, 'the ECtHR is the only effective international human rights mechanism'; the sentiment is echoed by other Romanian, as well as Turkish, respondents, in particular.

Third, and beyond where the Court stands in the national legal order, also critical is where the majority faith stands in the 'national religious order': in all the country cases under study here, there is a system in place of distinguishing between rights and privileges afforded by the state to different religious groups, arranged in different forms of hierarchy in each case. The extent to which a majority faith enjoys a particularly privileged position, with this privilege established and maintained through Constitutional provisions – *especially* when considered in conjunction with the place of the Court in the national legal order – may significantly impact upon social actors' conceptions of the Court as a potential resource and thus worth informing oneself about. Here the Greek and Italian cases fall into one category and the Romanian and Turkish into another (though the latter not *purely* because of the lack of a legally privileged majority religion, as is suggested above). The Greek constitutional provisions setting out the Orthodox Church of Greece as the 'prevailing faith', and the terms of the Concordat between the Italian state and the Roman Catholic Church, both serve to discourage actors seeking to challenge that privilege (whether minority religious groups or secularist groups), and by extension limiting their expectations of the ECtHR in this aim.

In the Greek and Italian cases especially, the *Lautsi* Grand Chamber decision solidified the perception that the ties that bind church and state in these contexts are stronger than the Convention system's defence of minority (whether secularist or religious) rights. It also influenced greater attention amongst interviewees to the concept of the margin of appreciation (Fokas 2015a). Emphasis on the margin of appreciation is disproportionately high in the interviews with Greek social actors (viewed positively by majority religious respondents and negatively by conscience-based minority groups) – disproportionate both in relation to the other country cases and in relation to knowledge of other aspects of the Court and its case law. As a result, ECtHR judgements are referred to as 'a suggestion', and as acquiring 'an autonomy at the national level'. One Greek majority faith representative asked:

I wonder what the main criterion of judgment is in the Court's decisions. Shouldn't this criterion be societal cohesion? [...] There is a certain contradiction in the Court: on the one hand it seeks to protect minorities, on the other however it considers what each state would want.

Meanwhile, the ‘shadow of *Lautsi*’, in terms of a quashing of religious minority and secularist hopes of any change to the status quo in church-state relations, is particularly pronounced in the Italian case, as evinced by the following remark made in relation to *Lautsi* final judgement: ‘the EU bodies should be careful not to respect the local culture too much, otherwise they risk supporting something that in Italy is also anachronistic. The ruling on the crucifix is anachronistic for Italy’.

Fourth, the national track record of the state in question in relation to the ECtHR may impact levels of grassroots awareness of the Court: how much case law against the state in question is there before the Court, and with what percentage of violations found? As Madsen (2016) indicates, Italy and Turkey are the two countries with the highest numbers of cases against them at the ECtHR, and with the highest numbers of violations found, though for different underlying reasons. In Italy, the case law pointed to the technical need for modernisation of the Italian judiciary: mainly due to violations of Article 6 (right to a fair trial) because of the excessive length of Italian trials. By the early 2000s, judgements against Italy accounted for an average of 45% of the total number of judgements delivered by the Court (163). In Turkey, the large number of cases has more to do with problems in democratisation. In both cases, the negative experience of the countries with the Court (in general and not particular to the religious domain) raised levels of popular awareness of the Court at the grassroots level. But this awareness remains at a superficial level and does not translate into detailed enough knowledge as to influence actors’ rights consciousness or pursuit.

The latter effect is heightened by poor track records in terms of implementation of the judgements. According to Madsen, of the approximately 2400 cases decided against Turkey between 1987 and 2001, of which 87% found at least one violation, around 1700 judgements were not fully implemented as of 2012 (Madsen 2016, 164). The prevalence of this fact in Turkish social actors’ perceptions is striking: nearly every respondent in the Turkish case study made reference to Turkey’s poor implementation record, across all categories of respondents.⁹ The same fact also served as justification, offered by several respondents, for lack of awareness of case law beyond the Turkish country context, ‘because we have enough cases against Turkey to refer to’.

The question arises whether the latter discourages social actors from thinking about the Court as a potential resource. One interviewee claimed:

In Turkey, every time someone is in a legal struggle for his or her rights, they say ‘We will go to ECtHR!’ ‘If nothing else, we will go to ECtHR.’ You know there is a saying in Turkish ‘Do not feel so proud of yourself my Sultan, there is Allah greater than you.’ Now we say ‘Do not feel so proud the courts in Turkey, there is ECtHR greater than you!’ We say it jokingly yes but this also really our perspective on the issue.

Yet later in the course of the interview the same respondent indicated that ‘Yes, the ECtHR is greater than our national courts and has great decisions, but as long as there is no implementation it does not make a difference’. We have found similar assessments amongst several Turkish interviewees, particularly those without legal expertise.

Given the similarities between the Romanian and Turkish cases on several points, it is interesting to note a stark difference in conceptions of accessibility of the Court: several Romanian respondents perceive of the Court as ‘too far’, and of litigating before the Court as a rather distant (and expensive) prospect, whereas by and large Turkish

respondents see a rather clear and accessible path to the Court: the path through national courts may be long, but it is rather more certain to lead to the ECtHR. The distinction between the two cases on this point seems to be linked to the difference between the volume of religion-related cases against each state in question.

Of agency and information

Amidst the significant differences in levels (and consequences) of awareness of ECtHR religion-related case law found amongst respondents across the four country-based case studies, one stable factor across all cases is the conspicuous role played by agency. More precisely, the data naturally draw distinctions between the awareness levels of legal experts (whether cause lawyers undertaking cases before the ECtHR, legal scholars or legal advisors to NGOs or conscience-based groups) and that of other respondents. As noted by Alter, Helfer and Madsen (2016, 24), legal experts, including practicing lawyers and legal academics, are often central to the development of a court's authority: 'narrow or intermediate authority is often associated with a handful of legal practitioners who are frequent judicial interlocutors'. This has certainly been borne out through the field-work conducted: in each case study a number of interviewees stand out at those who have led the way in case law against their respective states. Thus, the effects of their awareness of the Court and its case law are particularly salient in terms of rights pursuit. Their role also tends to be significant in terms of rights consciousness, as these lawyers are often the primary source of information for members of various NGOs and conscience-based groups about rights established through ECtHR jurisprudence. As Zemans (1982, 1013) notes, legal competence is thus more than passive knowledge of rights and duties but, rather, 'an active and searching awareness of the opportunities offered by law for enhancing one's position in society' (1009–1010). And lawyers in the continuous employment of those whose rights they represent can serve as the client's rights consciousness by providing for their clients that 'active and searching awareness of the opportunities offered by law' (1013).

Thus, a first rather obvious factor influencing social actors' awareness of the Court and its case law across all country cases is the role played by agency and, specifically, whether the interviewee is a lawyer, has legal expertise or belongs to a group employing an in-house lawyer. There are clear distinctions in the levels of awareness between those belonging to none of these three sub-categories of 'legal competence' and those who do, as well as *within* these three sub-categories. Across all cases we found a strong tendency of interviewees without such legal competence to defer to lawyers for the 'non-test test', as well as regarding any other details about the Court. One interviewee responded to the first question testing case law awareness with the question 'Are you a lawyer?' Thus, amongst respondents beyond the aforementioned three sub-categories of legal competence, we found a strong sense that talk of case law is 'for lawyers only'.

Strategic litigants fall into a category of their own: they stand out especially for their cautious approach, revealing a high level of awareness of the risks involved, for the greater cause in question, in a potential loss before the ECtHR. This fact reflects a higher level of awareness of the workings of the Court, its impact, etc. which tends to be accompanied by a broad repertoire of cases from which they drew during the course of the interviews. That said, this broad repertoire, even for strategic litigants (the category

exhibiting the highest levels of case law awareness), generally remains within the scope of the issue-area with which they work (e.g. LGBT-related issues or religious autonomy). As one legal expert put it,

It takes time to find out about [ECtHR decisions]. Not all jurists have this reflex – unlike the way most of us have the reflex to check for amendments in Romanian law, to look in a legislation database to see what happened to law X, if the Parliament amended it [...] it'd be an illusion to think that the average magistrate, lawyer, or finally, jurist first thing in the morning checks the ECHR case law. No European jurist [...] no jurist without a special interest in ECHR does that.

Amongst respondents with no legal expertise, representing conscience-based groups which do not employ legal experts, the vast majority showed little to no awareness of *any* particular ECtHR cases; at best they tended to recall themes addressed by the Court but without being able to name the cases directly.

This leads us to a second factor influencing social actors' awareness of the Court and its religion-related case law: the availability of information about the Court, whether through the mass media¹⁰ or other means, such as information disseminated through larger groups' (whether religious, non-religious or NGO) own channels of information. Here stark differences between the US and European contexts in this regard return to the forefront of attention: for example, the members of many churches and religious organisations in the USA have relatively high levels of knowledge of court decisions because information about these is disseminated actively by the groups themselves, through newsletters as through the pulpit.¹¹ Such information dissemination is less common within religious groups and organisations in the countries under study here, whereas – and in line with Frances Zemans' point noted above regarding the 'Anglo-American legal tradition' – such tendencies *are* to be found more prominently amongst groups in the UK.¹² Yet, new distinctions arise between, for example, the awareness levels of members of religious groups with a base in the USA and those without. In the case of groups such as the Jehovah's Witnesses, for example, with their highly centralised leadership from a base in Brooklyn, a Jehovah's Witness in Romania *may* have equal access to information about ECtHR cases as her fellow believer in the USA. Thus, the role of the mediating institutions – the specific sources of information about the ECtHR and its case law provided within certain groups – deserves careful attention.¹³

A third factor is the degree to which the group represented by the interviewee (where applicable) is generally litigious or not (a point which often correlates with whether the group employs an in-house lawyer). Certain conscience-based groups rather adamantly avoid, or seek out, courts for their rights claims. Muslim minority groups across all cases tend to belong to the former category, while Jehovah's Witnesses, and atheists, belong to the latter. The comment of one Muslim minority spokesperson is representative of the perspective found amongst many in a similar position: 'Well, [the ECtHR] is indeed relevant for us, but I wouldn't want us to end up there'.

The latter point links to the tendency found amongst many respondents across all cases to speak about the act of taking a case to the ECtHR as fundamentally anti-national. References are made to wanting to be good citizens, or to avoid displaying 'our dirty laundry' in Europe. And both categories of the less litigious and the 'stoic-patriotic' tend to display lower levels of detailed awareness about the Court and its case law.

Further analytical work needs to be done on a fuller data set in order to detect patterns in issue-related versus nation-specific awareness, but preliminarily it can be noted that NGO representatives and cause lawyers seem to display an awareness limited to particular issues-areas, but which *might* cross national boundaries (the latter is not generally the case), while the case law awareness of representatives of conscience-based groups tends to be specific to cases against their own country.

Enough respondents indicated the unattainability of the ECtHR due to limited financial resources to suggest that there is a correlation between financial resources and case law awareness, given that these interviewees also showed with lower levels of case law awareness. (Whether their assessments of the related costs are realistic or not was not assessed by the researchers). Here, too, the distinction between respondents with or without legal expertise is stark. Specifically, financial resources are discussed by those with legal expertise only as potential barriers to interest in and awareness of the Court because of the high cost of exhausting all national legal remedies (a point which varies from country to country, as discussed below). This category of respondents knows well enough that the cost of litigating before the ECtHR itself should not discourage aiming to reach the Court, as *pro bono* and strategic litigants' support is almost always available at this stage of litigation, if not from within the country than from beyond. In contrast, those without legal expertise tend to link high costs only with litigating before the ECtHR.

Also notable is the tendency of interviewees with lesser legal awareness to seek to learn more about the Court through the interviews. 'What happened next?', asked one Romanian interviewee, after having been told the basics of the SAS case. 'How much can the ECtHR get involved in a country's legislation?', he asked later in the course of the interview, and 'Which are the European countries that accept all ECtHR decisions?' Such probing questions were common enough – particularly in the Greek and Romanian interviews – as to raise questions regarding the line between observation and intervention.

Conclusions

In spite of the objective challenges to applying North American socio-legal scholarship, much of which is focused on the United States Supreme Court, to a study of the indirect effects of the ECtHR and its case law, such study is considered worthwhile for the insights it has generated regarding awareness of the Court and its case law. First and foremost socio-legal scholarship has inspired study of Court impact at the grassroots level (McCann 1992, 741–742): only at this level, and through in-depth qualitative research, can we get a sense of what the Court and its case law means for religious pluralism on the ground, for social actors with a vested interest in religion-related (broadly defined) case law.

The *Lautsi* case serves as a foil for cross-country comparative analysis, as its different reverberations across the cases are revealing of country context-specific relationships with and orientations towards the Court. Comparative analysis across the cases reveals a range of factors influencing levels of awareness of the Court and its case law, including variation in national political and legal opportunity structures; the *de jure* and *de facto* standing of the Court stands within the national legal order; the *de jure* and *de facto*

place of the majority faith within the 'national religious order'; the national track record before the court and the national *implementation* record.

Further, by honing in on levels of awareness of the Court and its case law, the research underpinning this contribution taps into a critical indicator of the extent to which the Court has the *potential* to be practically relevant to social actors working at the grassroots level. In revealing relatively low levels of awareness of case law (relative at least to the North American context and, specifically, to the US Supreme Court), the research gives rise to an imperative for greater public information about the ECtHR and its case law. It lends credence to generalised conceptions of European institutions as relatively far from the citizen – at least, from the non-legal citizen – when case law is thought to be a matter strictly for lawyers. The research results support Rosenberg's (1991) and Klarman's (2001) claims regarding a link between low levels of media attention to and public information available about the Court, on the one hand, and hollow hope in expectations of social change, but only with regard to social actors lacking in legal expertise. As Alter, Helfer and Madsen explain, and as is borne out in the scholarship presented here, it is legal experts who are especially critical to the development of a court's authority through their conspicuous role as providers of information regarding courts and their case law; here indeed we find significant mobilising power of the case law of the ECtHR. Thus, in examining the aggregate interview data, a distinction between actors with legal expertise versus those without becomes particularly salient. Further, the research also points to a need for greater understanding of the mediating institutions in the generation of legal knowledge for consumption by their own members and, specifically, the generation of information about the ECtHR and its case law.

Thus, the role of in-house legal expertise is one thing, and that of mass media coverage of the ECtHR quite another. The attention to media coverage serves as a window onto a larger point regarding public relevance of the Court: in the European context, greater media attention has tended to be linked to an undermining of the Court's authority, as the example of the most media attention to the Court – that of the UK – is also the case in which media attention has reflected an inward-looking nationalist-tending reaction to the Court's perceived affront to national sovereignty. Herein lies a particular challenge to the public authority of ICs, such as the ECtHR, in that the Court represents populations of 47 different cultural, political, historical and social backgrounds and narratives, each with potential concerns about encroachment on national sovereignty by the ECtHR (see Christoffersen and Madsen 2013; Conant 2002 for a discussion of relevant challenges in the context of the ECJ).

This point is supported by the many iterations amongst (again, non-legal) interviewees across all cases of the concept of litigation before the ECtHR as a fundamentally 'anti-national' act, even if for some in this category it is an act in which the interviewees participate out of necessity, for lack of other opportunities to vindicate their rights claims.

As Hoekstra (2003) has suggested, the unfolding of localised effects of Court decisions is subtle and gradual in nature. This fact entails a loud cry for ongoing research into the indirect effects of the ECtHR case law, particularly in a time of change from a Court driven more by international law to a Court currently especially vulnerable to national politics (Christoffersen and Madsen 2013; see also Fokas 2016). The trickledown effect takes time to develop, and there are currently many situations in flux in the realm of national versus international politics. The Turkish case offers an example of effects

already evident, wherein the impact of Turkey's derogation from the ECHR leaves a conspicuous mark on grassroots actors' interest in engaging with the ECtHR. Thus scholars should watch this space carefully in order to detect the aftereffects – again at the grassroots level – of the particularist backlash against the ECtHR which has given birth to greater emphasis on the principle of subsidiarity and the margin of appreciation (see Christoffersen and Madsen 2013; see also Fokas 2016). The latter will significantly impact upon social actors' engagements with the ECtHR but, as this research has shown, this impact is likely to vary from one context to the next.

Finally, the research presented herein lends credence to the argument that judicially articulated norms must be understood 'in the eye of the beholder', as they take a life of their own at the grassroots level. Thus, the Court's religion-related case law is only as effective at the grassroots level as the power it is conceived to have by the individuals and institutions mediating the relevant information about it. As such the research further elaborates 'the myth of rights' (Scheingold 2004) by offering critical insight into the different ways the Court's case law impacts upon the grassroots level, and the different consequences of the latter in terms of rights consciousness and rights pursuit.

Notes

1. This text is based on data generated in the European Research Council-funded Grassrootsmobilise research programme (GA no. 338463). The text relies on the interview transcripts available at the time of writing – i.e. 71 interview transcripts – generated by the postdoctoral researchers in Grassrootsmobilise (see www.grassrootsmobilise.eu). It also draws on the monthly reports on the fieldwork drafted by the postdoctoral researchers conducting the research in each country context, as well as on reports prepared on specific aspects of the broader research programme and various versions of the researchers' book chapters and journal articles drafted on the basis of the research. I would like to thank my colleague Dia Anagnostou for her comments on an earlier version of this text, as well as the participants at the Grassrootsmobilise side event at the American Political Science Association conference in San Francisco on 31 August 2017 (see <http://grassrootsmobilise.eu/grassrootsmobilise-independent-session-apsa-annual-conference/>), where this paper was first presented, for their contributions to the fruitful discussion around the topics addressed here, and in particular Michael McCann for his response specifically on this paper. I am also grateful for the extremely helpful feedback offered by the anonymous reviewers of this text. Finally, I would like to acknowledge the LSE Hellenic Observatory (HO) for its facilitation of my work in Grassrootsmobilise.
2. This and the remaining poll data cited in this paragraph are drawn from McCrea (2015, 95–96).
3. Grassrootsmobilise entails also a study of media references to ECtHR religion-related decisions. The latter entailed qualitative and quantitative examination of such references across five mainstream newspapers in the four country case studies of Greece, Italy, Romania and Turkey, and yielded – similar to Rosenberg and Klarman's critiques – generally low levels of media coverage of the case law (for more information, see www.grassrootsmobilise.eu). However, as eloquently argued by Sarahfina Aubrey Peterson in her Master's thesis (2014), reliance on print media for an understanding of public access to information about courts is rather outdated: in the age of social media, 'the local newspaper, or even newspaper home websites are no longer responsible for the bulk of the news that people consume. Instead, people often subscribe to newsfeeds and they share stories among their family, friends and co-workers' (17).

4. According to van Opijnen et al. (2017) in a study of online publication of court decisions within the EU, there are substantial differences across European states in terms of whether there are legal or policy frameworks governing the online publication of court decisions, and the notion of Open Data has not yet established a strong foothold within European judiciaries.
5. For more comparative work on the two courts, see, for example, Kiska (2013); Rosenfeld (2006); O'Mahony and Dzehtsiarou (2013); Bribosia, Rorive, and Laura (2014); Witte and Arold (2011); Gedicks and Annicchino (2015) and Calo (2013).
6. The interview data on which this paper draws (see note 1) is not evenly distributed across the cases: 28 interviews from the Greek case study; 22 from the Italian case; 11 from the Romanian case and 10 from the Turkish case. This imbalance is offset by the incorporation of data from the broader research programme from which this contribution emanates, as indicated in note 1.
7. These are *more or less* evenly distributed across the country cases, with the exception of legal experts (9 in both the Greek and Italian cases, 3 in both the Turkish and Romanian cases), a higher number of NGO representatives in the Italian case (8, as opposed to 2 in the Greek case, 2 in the Romanian case and 4 in the Turkish case), and majority faith representatives (with the vast majority in the Greek case).
8. See 'National Court Studies' [soon to be] available online.
9. It should be noted though that the sample of interview transcripts available for analysis at the time of writing (10) is very small.
10. See note 3.
11. I owe this insight to Michael McCann, offered in his comments in response to an earlier version of this text.
12. See, for example, the work of the London-based Christian Concern, the newsletter of which disseminates detailed information about religion-related case law in the UK and at the ECtHR.
13. This is, at the time of writing, a work in progress in the Grassrootsmobilise research programme, but see indicatively the 'Note from the Field' provided by researcher in the Italian case study Alberta Giorgi, available at <http://grassrootsmobilise.eu/8-italy-know-your-rights-all-three-of-them/>.

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